

CHAPTER 5 – COMMENCEMENT OF PROCEEDINGS AND TEMPORARY RELIEF AVAILABLE

STATUTORY REFERENCES: **RSA 169-C (Child Protection Act)**
 RSA 173-B:1 (Definitions)
 **RSA 173-B:3 (Commencement of Proceedings;
Hearing)**
 RSA 173-B:4 (Temporary Relief)
 RSA 173-B:11 (Notice to the Victim)
 RSA 288 (Holidays)
 RSA 458:17 (Support and Custody of Children)

CROSS REFERENCES: **Chapter 2 - Definitions of Domestic Violence and
Protected Persons**
 Chapter 14 - Firearms and Other Deadly Weapons

INTRODUCTION

Pursuant to RSA 173-B:11, the clerk of court is charged with the responsibility of advising the plaintiff of specific issues that the plaintiff may ask the judge to consider when writing the order. The sections below expand upon the basic information which must be conveyed to the plaintiff and set policy for assisting the parties in the process.

A. GENERAL STAFF RESPONSIBILITIES

PROTOCOL 5-1

All staff shall be fully trained to handle domestic violence cases. The clerk may, however, designate one or more members who will be primarily responsible for handling domestic violence petitions and related issues.

PROTOCOL 5-2

Trained personnel should be available to respond to any domestic violence inquiry during

court business hours.

PROTOCOL 5-3

Except for requests for telephonic orders issued during non-business hours, all petitions seeking protective orders shall be filed at a courthouse.

PROTOCOL 5-4

The designated staff person should meet with the plaintiff and inquiry should be made as to the following:

- a. Check for proper jurisdiction.

COMMENT

The clerk's role at this stage is to gather information for presentation to the judge. It is not the clerk's responsibility to determine whether a plaintiff qualifies for a protective order.

- b. Court staff should ask the plaintiff where the defendant is at the present time.

COMMENT

In the event that the defendant is on the way to the court or arrives during the filing of the petition, court security personnel should be notified. If no security is available, court staff should press the duress alarm and bring the plaintiff into the clerk's office.

- c. Ask whether the defendant is a family or household member.

COMMENT

Minor children and step children of the defendant wishing to bring an action against a parent may do so under the juvenile statute. See RSA 169-C.

- d. Ask whether the defendant is a spouse or ex-spouse.
- e. Ask whether the parties currently share the same residence, or have in the past.

COMMENT

Roommates who have not been involved in a romantic relationship may not be covered by this statute.

- f. Ask whether the defendant is a current or former sexual or intimate

partner.

COMMENT

Intimate partner means persons involved in a romantic relationship, whether or not such relationship was ever sexually consummated and includes same sex relationships.

- g. Ask whether the plaintiff has been subjected to any acts of abuse as defined by RSA 173-B. (Reminder: A copy of the brochure should be given, or read, to the plaintiff.)

PROTOCOL 5-5

Every attempt should be made to provide privacy and security to the plaintiff during the inquiry/completion of the petition. Remember that contact with the public must be courteous, compassionate and non-judgmental.

PROTOCOL 5-6

The clerk shall provide the plaintiff with the following materials:

- a. Petition;
- b. Pamphlet describing the process (this should be appended to the petition);
- c. Information regarding the availability of local crisis centers;
- d. List of community support services;
- e. Information on the Address Confidentiality Program;
- f. Defendant Information Sheet for Law Enforcement;
- g. Defendant Information Sheet for the Administrative Office of the Courts;
and,
- h. Domestic Violence Confidential Information sheet.

PROTOCOL 5-7

The clerk shall instruct the plaintiff to be specific when completing the petition about the facts causing fear for safety, including dates and times at which events occurred, if known. If the plaintiff has difficulty reading, hearing, writing, or understanding the English language, the clerk's staff member shall fill out the form or provide an interpreter.

COMMENT

If an interpreter is required, staff should follow regular court procedure.

PROTOCOL 5-8

The clerk shall advise the plaintiff of the statutory relief available under RSA 173-B:11, II.

PROTOCOL 5-9

A notary public or justice of the peace shall take the plaintiff's oath as follows: "I swear that the following information is true and complete to the best of my knowledge. I understand that making a false statement on this petition will subject me to criminal penalties."

PROTOCOL 5-10

The clerk should browse the SUSTAIN party index to determine whether there are on file any "active" restraining orders or pending criminal or civil cases involving the same parties. If so, the case should be pulled and presented to the presiding justice to ensure that no inconsistent orders are issued by the court.

NOTE: Under no circumstances should the presence of previous filings or orders be considered in determining whether the presently pending petition should be granted.

PROTOCOL 5-11

All district courts have been provided with an informational videotape outlining the court process. The tape should be made available for viewing by plaintiffs and defendants. Plaintiffs should be instructed to view the video prior to completing the petition, when possible. If the plaintiff is unable to view the video that day, staff should advise the plaintiff that she/he may view the tape any time prior to the final hearing. The court should ensure that all necessary safety precautions are followed. If time permits it will be helpful for the plaintiff to review the tape prior to the completion of the petition.

NOTE: Under no circumstances shall the parties view the videotape together.

B. CONDUCT OF HEARING

As indicated above, it is very important that domestic violence cases be accorded prompt, efficient and dignified treatment. The protocol for the issuance of *ex parte* orders is designed to encourage that treatment.

PROTOCOL 5-12

The clerk or other staff member should accompany the plaintiff to the judge's chamber or hearing room and remain in the room during the *ex parte* hearing. If an advocate is present, the advocate shall be permitted to accompany the plaintiff into the courtroom or judge's chambers.

COMMENT

All hearings shall be conducted in the courtroom or chambers with a court security officer or clerk present.

If a judge will be unavailable to review a petition within 30 minutes of its filing with the court, the clerk shall follow the instructions set forth in Protocol 4-3.

PROTOCOL 5-13

The judge shall review the completed domestic violence petition. If the allegations are unclear or purely summary in nature, the plaintiff should be requested to provide more specific information, and the judge should make a note of it on the face of the petition or by attachment, if additional space is needed.

COMMENT

If the judge relies upon oral testimony presented during the *ex parte* hearing, which is not reflected in the plaintiff's written petition, the judge should make note of those facts on the face of the petition or on an order appended to the petition prior to service upon the defendant.

PROTOCOL 5-14

Under no circumstances should the victim's address and telephone number be part of the public record, except by order of the court for good cause shown. Access to this information shall be provided to appropriate law enforcement. The victim shall be notified that this information will be released to the applicable law enforcement agency.

C. PROOF REQUIRED

PROTOCOL 5-15

If, based upon a review of the allegations in the petition and, if needed, discussion with the plaintiff, the court is satisfied that it has jurisdiction and that credible facts amounting to abuse, as defined by the statute, have been alleged, and that there is an immediate and present danger of abuse, the court shall issue such temporary orders as it deems necessary to protect the plaintiff.

COMMENT

It is widely accepted that an act or acts of abuse of recent occurrence in

combination with other behavior or circumstances, including such events as the defendant's release from incarceration, may be sufficient to demonstrate a showing of "immediate and present danger of abuse" to meet the statutory requisite for the issuance of an *ex parte* order.

COMMENT

If the court finds that abuse has been alleged but there is no immediate and present danger of further abuse at the time of the *ex parte* hearing, then it may choose not to issue a temporary order. This should not preclude the possibility of granting an order at a future time.

COMMENT

If the victim appears not to be in immediate danger, but the judge thinks there is a possibility of a finding of abuse with a credible threat to the safety of the plaintiff, the judge may schedule a final hearing, without granting temporary orders.

NOTE: This is a potentially volatile situation. The victim may be placed in danger if the petition was filed without the knowledge of the defendant, and the defendant is served with notice of a hearing. The court should discuss the situation with the plaintiff to ascertain that a viable safety plan is in place. A referral to a shelter may be necessary.

D. ORDERS AVAILABLE

PROTOCOL 5-16

RSA 173-B:4 sets out the temporary protective orders and other relief that the court may consider once the appropriate findings have been made. Note that the list of orders is non-inclusive. The judge can include appropriate orders as required by the circumstances of the case and add orders not printed on the form. The following are the orders delineated in the statute.

- a. The court may restrain the defendant from abusing the plaintiff.
- b. The court may restrain the defendant from entering the premises and curtilage where the plaintiff resides, except when the defendant is accompanied by a peace officer and upon reasonable notice to the plaintiff, is allowed entry by the plaintiff for the sole purpose of retrieving toiletries, medication, clothing, business equipment, and any other items as determined by the court.
- c. The court may restrain the defendant from withholding items of the plaintiff's personal property that are specified in the order. A peace officer shall accompany the plaintiff in retrieving such property to protect the plaintiff.

COMMENT

The court should inform the plaintiff that if the defendant seeks to take possession of personal property which plaintiff feels is the plaintiff's, the property should be left in possession of the plaintiff and a written request made to the court to decide the issue.

- d. The court may award custody of minor children to either party, or, upon notice, to the Division for Children, Youth and Families when in the best interest of the child(ren).
- e. When findings sufficient to form the basis for the issuance of an *ex parte* order are made, custody of the children should generally be given to the plaintiff except in extraordinary circumstances. If custody is given to the defendant, the court shall state its reasons for doing so in writing.
- f. The presumption in favor of joint custody found in RSA 458 does not apply in domestic violence cases.

COMMENT

In any given domestic violence case, the parties may have a custody order from another court. The court should advise the plaintiff that a petition should be made to the appropriate court for modification of existing orders. This procedure should be started while the temporary orders are in place to provide some protection for the plaintiff and the children. Fitchner v. Pittsley, decided June 19, 2001, further suggests that in such cases the district court should consider transfer to the superior court.

- g. Custody shall not be given to the Division for Children Youth and Families (DCYF) unless the Division is given an opportunity to consult with the court and written findings are made that:
 - (i) The child's health or life is in imminent danger if immediate action is not taken, and the protective order would not correct the situation; and
 - (ii) There is no parent, relative or friend capable of providing care for the child.
- h. If temporary custody is awarded to the Division for Children Youth and Families (DCYF), the court must conduct an expedited hearing on the question of custody **within five (5) calendar days** of the issuance of the *ex parte* order. Unless facts sufficient to form the basis for the filing of a petition pursuant to RSA 169-C exist and unless such a petition is filed, the court should, except in extraordinary circumstances, return the child to the custody of one of the parents or to an agreed

upon third party.

- i. If appropriate, the court may provide for visitation with the children. If the plaintiff feels threatened by this contact, the court should discuss with the plaintiff the possibility of establishing a location, safe for the plaintiff, for the transfer of the children, for purposes of visitation with the defendant. Consideration should be given by the court as to whether it may be appropriate to prohibit visitation, pending the final hearing.
- j. The court may deny the defendant visitation, order that visitation be supervised, or order a specific visitation schedule. Visitation shall only be ordered on an *ex parte* basis where such order can be entered consistent with the following requirements. In determining whether visitation can be safely ordered, the court shall consider the following factors:
 - (i) the degree to which visitation exposes the plaintiff or the children to physical or psychological harm;
 - (ii) whether the risk of physical or psychological harm can be removed by ordering supervised visitation; and
 - (iii) whether visitation can be ordered without requiring the plaintiff and defendant to have contact regarding the exchange with the children.
- k. The court may restrain the defendant from contacting the plaintiff or entering the plaintiff's place of employment, school, or any specified place frequented regularly by the plaintiff or by any family or household member.
- l. If the court issues a "no contact" order, the plaintiff should be informed that any contact by the defendant with the plaintiff shall constitute a violation of this restraining order and may subject the defendant to criminal prosecution.
- m. The court may restrain the defendant from abusing the plaintiff, plaintiff's relatives, regardless of their place of residence, or plaintiff's household members in any way.
- n. The court may restrain the defendant from taking, converting or damaging property in which the plaintiff may have a legal or equitable interest.
- o. The court should inquire of the plaintiff whether the defendant possesses, controls or owns any firearms, ammunition or other deadly weapons. If the plaintiff answers the court's inquiry in the affirmative, the court should, in its discretion, order relinquishment of the weapons to a peace officer. (See Chapter 14 – Firearms and Other Deadly Weapons)

COMMENT

The plaintiff should make a list of firearms, ammunition and deadly weapons, if possible. The Defendant Information Sheet for Law Enforcement should be filled out and passed on to the appropriate law enforcement department.

- p. The court may direct the defendant to relinquish to a peace officer any and all firearms, ammunition and deadly weapons in the control, ownership and possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order. (RSA 173-B:4, I and 173-B:4, I(a)(9).)
- q. The court may prohibit the defendant from purchasing, receiving or possessing any deadly weapons, firearms and ammunition for the duration of the order. (RSA 173-B:4, II)
- r. The judge should specifically ask the plaintiff whether there are any additional orders required. The judge should check the appropriate order lines.

Other relief may include, but is not limited to:

- (i) Awarding to the plaintiff the temporary exclusive use of an automobile. (RSA 173-B:4, I(b)(1)).
- (ii) The judge should make an order with respect to the temporary exclusive use and possession of the parties' home and household furniture, if the defendant has the legal duty to support the plaintiff or the plaintiff's minor children, or the plaintiff has contributed to the household expenses. The court shall consider the type and amount of the contribution to be a factor. (RSA 173-B:4, I(b)(1)).
- (iii) The judge may restrain the defendant from taking any action which would lead to the disconnection of any and all utilities and services to the parties' household, or the discontinuance of existing business or service contracts, including, but not limited to, mortgage or rental agreements.

E. SCHEDULING A FINAL HEARING

INTRODUCTION

RSA 173-B:3, VII provides that the final hearing is to be held **within 30 days** of the filing of the petition or **within 10 days** of service of process of the defendant, whichever occurs later.

PROTOCOL 5-17

The clerk should assign a docket number and a PNO number to the case, select a hearing date for the final hearing (which must be held **within 30 calendar days**) and enter the data into SUSTAIN. If the case is to be transferred to another court, the clerk shall obtain a hearing date from the transferee-court. The clerk should ensure that the victim's telephone number is on file in court records.

PROTOCOL 5-18

Unless an expedited hearing request is made, final hearings should be scheduled near the end of the 30-calendar-day period.

COMMENT

Scheduling of domestic violence cases takes priority over other cases without statutory or other time limitations.

PROTOCOL 5-19

A defendant may request an expedited hearing. If so, pursuant to RSA 173-B:4, I, such a hearing shall be held **no less than three (3) nor more than five (5) business days** after a written request is received by the clerk from the defendant in response to temporary orders issued *ex parte*.

COMMENT

This hearing may, in the discretion of the court, constitute the final hearing in a case.

COMMENT

Time frames for scheduling expedited hearings should be computed according to Rule 1.1 of the district and municipal court rules. Pursuant to those rules, the day the petition is filed shall not be included. Likewise, the day the written request from the defendant is received by the court shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, or legal holiday, as specified in RSA 288, as amended.

PROTOCOL 5-20

If a continuance of the final hearing is granted, the case should be expeditiously rescheduled, but in all cases, **within 14 days** unless for good cause shown. However, it need not

be rescheduled within the statutory time frame. The temporary order should be extended until disposition of the final order.

PROTOCOL 5-21

The clerk should advise the plaintiff that if s/he wishes to have an attorney, the plaintiff should contact the local crisis center that will then contact a DOVE attorney.

COMMENT

The NH Bar Association sponsors the DOVE program, providing free legal services for victims of domestic violence at final hearings if victims are unable to afford counsel. “**DOVE**” is an acronym for Domestic Violence Emergency Program (**DO**mestic **V**iolence **E**mergency program).